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No.

IN THE

Supreme Court of the United States

VICKI STEINER, PETITIONER

v.

WILLIAM J. HENDERSON, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petitioner, a government employee, was denied her due process rights since she was complying with the internal discrimination grievance process that extended beyond the Equal Employment Opportunity time deadlines thereby preventing her to exhaust her administrative remedies in order to preserve her right to pursue a civil action for discrimination based upon gender. The decision is of great public importance whereby a conflict exists for government employees who must abide by the internal grievance process, but which process hinders upon their administrative procedural remedies.

I. WHETHER THE DISTRICT COURT OF OHIO AND THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S COMPLAINT AND FAILING TO APPLY THE DOCTRINE OF EQUITABLE TOLLING BASED ON UNTIMELINESS WHEN THE PETITIONER WAS COMPELLED TO COMPLY WITH THE GOVERNMENT'S GRIEVANCE PROCESS THAT HINDERED UPON THE ADMINISTATIVE PROCESS WITH THE EEOC CAUSING SEVERE PREJUDICE, VIOLATING THE PETITIONER'S RIGHT OF A JURY TRIAL, AND VIOLATING HER DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit dated December 8, 2003 affirming the United States District Court for the Northern District of Ohio, Eastern Division's Decision granting the Respondent's motion to dismiss, which decision is set forth in the Appendix, p. 1a. The Decision of the United States District Court for the Northern District of Ohio, Eastern Division dated March 28, 2002 is set forth in the Appendix, p. 14a.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Sixth Circuit affirmed the United States District Court for the Northern District of Ohio, Eastern Division's decision granting the Respondent's motion to dismiss. This Petition is timely filed within the prescribed ninety-day period.

RELEVANT PROVISIONS

CONSTITUTIONAL PROVISIONS

Seventh Amendment, United States Constitution:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISIONS

42 U.S.C. Section 1983, Civil Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected,...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. Section 2000e-2:

> Unlawful Employment Practices
>
> (a) Employer practices

> It shall be an unlawful employment practice for an employer – to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin...

STATEMENT

This is an action arising out of Vicki Steiner's, the Petitioner, employment with the Respondent, the United States Postal Service. The Petitioner was a twenty-three year veteran at the Canton, Ohio Plant of the Respondent. In 1997 she bid for and was awarded the vacant position of Manager Distribution Operations (hereinafter "MDO") for the Tour 3 shift, the afternoon shift.

The MDO work week was Monday through Friday, non-scheduled days being Saturday and Sunday. MDOs were mid-level managers having the responsibility to manage supervisors and employees who processed mail in the plant. In April of 1998, Judson Zernechel arrived at the Canton Plant as the Plant Manager. Within one month of his arrival, he instructed the Petitioner to work on the first of many work details outside of her permanent bid job, which details lasted for approximately three years.

In September of 2000, Zernechel ordered the Petitioner to return to the Canton Plant. However, rather than returning the Petitioner to her bid position, Zernechel assigned her to Tour 1, that is, the midnight

shift. Moreover, Zernechel altered the MDO position to require the Petitioner to work weekends, with Tuesdays and Wednesdays as non- scheduled days. This was an unprecedented manager work schedule in the Petitioner's twenty-three year history at the Canton Plant.

Also, Zernechel initiated an illegal personnel action by designating the Petitioner as an "MDO In Training," a position that did not exist within the Respondent's organization. Simultaneously, Zernechel gave a similarly situated male employee, Al Restivo, the Petitioner's original bid job; he was not designated as "MDO In Training", although he had also been on temporary work details. Restivo's work schedule was not altered. Both of these wrongful job actions were posted plant wide on October 4, 2000 by Zernechel's order.

As a manager, the Petitioner had received extensive training with the Respondent regarding complaints of discrimination. Accordingly, the Petitioner first attempted to discuss her complaint with her immediate supervisor Zernechel, but to no avail.

Following internal policy and the appropriate chain of command, the Petitioner contacted Frank Neri, Zernechel's immediate supervisor, requesting a meeting to address and resolve the illegal actions taken against her. Without any investigation or interview with the Petitioner, Neri instructed her to contact Zernechel, the alleged discriminator, regarding her complaints.

Neri's failure to follow the Respondent's policy caused the Petitioner to appeal in writing to the District Manager Jordan Small. Once again, the District Manager Jordan Small failed to investigate or intervene, advising the Petitioner that he had returned her complaint to Neri. After nineteen days, Neri responded to the Petitioner, instructing her to again meet with Zernechel, the man who had initiated the illegal job actions.

Only when it became apparent that none of the Respondent's managers intended to follow its own policy, the Petitioner contacted the Equal Employment Opportunity ("EEO") on January 9, 2001 for pre-complaint counseling. The Petitioner then filed a complaint alleging sexual discrimination on February 7, 2001. The complaint was dismissed as untimely on March 15, 2001. According, the Petitioner filed an action on May 3, 2001 against the Respondent alleging a claim of gender discrimination pursuant to 42 U.S.C. § 2000e-5 and 42 U.S.C. § 2000e-16.

The Respondent filed a Motion to Dismiss asserting that the Petitioner's Complaint failed to state a cause of action upon which relief could be granted. The Petitioner timely filed her response to that Motion.

On March 28, 2002, the United States District Court for the Northern District of Ohio granted the Motion to Dismiss stating that the Petitioner failed to timely exhaust her administrative remedies. The Petitioner filed a Notice of Appeal to the Sixth Circuit Court of Appeals which affirmed the District Court's decision on December 8, 2003.

The Appeals Court affirmed the District Court's opinion. Therefore, the Petitioner files this Writ of Certiorari requesting that this Honorable Court grant writ and review the merits of the case given that the Petitioner's constitutional rights have been violated and that equitable tolling revived the Petitioner's claims.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT OF OHIO AND THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN DISMISSING THE PETITIONER'S COMPLAINT AND FAILING TO APPLY THE DOCTRINE OF EQUITABLE TOLLING BASED ON UNTIMELINESS WHEN THE PETITIONER WAS COMPELLED TO COMPLY WITH THE GOVERNMENT'S GRIEVANCE PROCESS THAT HINDERED UPON THE ADMINISTATIVE PROCESS WITH THE EEOC CAUSING SEVERE PREJUDICE, VIOLATING THE PETITIONER'S RIGHT OF A JURY TRIAL, AND VIOLATING HER DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION.

A dismissal ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). Courts

may not dismiss a complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). The Petitioner must be given the opportunity to present her case before the jury – no jury has had the opportunity to weigh the evidence of her allegations since the District Court entered judgment based upon her failure to exhaust her administrative remedies. However, the Petitioner was compelled to comply with the internal government grievance process. The Respondent failed to investigate her claim and delayed any action, causing her to file a complaint with the EEO beyond the time period.1 If a government agency could fail to properly investigate a discrimination claim and cause a claimant's complaint to be dismissed based on untimeliness, the precedence is appalling. The Petitioner's claims are salient since the lower courts imposed no duty upon the Respondent, a government agency, to enforce its own policy regarding discrimination. Instead of complying with the discrimination accusation, the Petitioner's supervisors delayed any investigation and discredited any accusation. The Respondent's delay caused the complaint to allegedly be filed untimely. Nonetheless, the doctrines of equitable tolling and estoppel should have been applied.

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1 Before a federal employee may file a lawsuit under Title VII, she must first exhaust her administrative remedies. Under 29 CFR Section 1614.105(a)(1), an aggrieved employee must contact an Equal Employment Opportunity Counselor within forty-five days of the alleged discriminatory act. The forty-five day time is not jurisdictional, and therefore may be subject to the doctrines of equitable tolling, waiver or estoppel.

The Respondent illegally reclassified the Petitioner's position and significantly modified her working conditions to her detriment based upon her gender. The Respondent placed a similarly situated male employee into her bid position. Following these events, the Petitioner worked diligently to resolve her complaints utilizing the established and prevailing employment policy regarding discrimination in the workplace. The Petitioner's efforts to quickly resolve this matter were rebuffed by the Respondent's managers having the authority to rescind the illegal job re-classification. By failing to properly investigate the Petitioner's accusation, the Petitioner had been severely prejudiced.

In *United States v. Fausto*, 484 U.S. 439, 98 L.Ed.2d 830, 108 S.Ct. 668 (1988), the Supreme stated that Congress intended to provide "an integrated scheme of administrative and judicial review of adverse personnel actions taken against federal employees, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 672.

The Respondent, a federal government agency, violated the Petitioner's due process rights by failing to comply with the investigative and administrative process of a discrimination claim. A government agency violated the legitimate purpose of federal statutes to protect employees.

A. The lower courts denied the Petitioner's constitutional due process rights.

A complaint is not subject to dismissal unless it appears to certainty that a plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968).

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that

> "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts".

Id. The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury.

Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve her substantive right of the opportunity to be heard. If the case is not heard by a jury, then a federal employee must disregard the internal procedural process of a discrimination claim. A government agency must be held at a higher standard – it cannot be allowed to establish mandatory grievance procedures and at the same time hinder the other administrative processes. If the lower courts' decisions are upheld, then the number of cases before the EEOC and courts would significantly increase since there would be no resolution at the government agency.

Moreover, the Due Process Clause of the Fourteenth Amendment requires that a state prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). In *Mullane*, the Supreme Court stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. The courts failed to protect the Petitioner's property – her government job that she vested twenty-three years of her life.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied those basic constitutional concepts – the Petitioner was not given a reasonable opportunity to present her case from an arbitrary or unjust appropriation. Instead her case was dismissed as untimely because she was complying with the Respondent's internal policy and procedure.

Investigations provide due process. *Thomas v. United States*, 47 Fed.Cl. 560 (2000). Since the Respondent had regulations regarding the investigation process, it failed to comply with them by the managers' intentional delay in responding to the Petitioner's complaint. *Sargisson v. United States*, 913

F.2d 918, 921 (1990). The Petitioner was entitled to due process in the investigatory stage, not being shuffled from the three managers. *Weaver v. United States*, 46 Fed.Cl. 69 (2000). Since there was no proper investigation by any of the Respondent's supervisors, the Petitioner was denied due process, a substantive right, resulting in an adverse employment act.

To constitute an adverse employment action, an act must result in a loss in pay or benefits, a detrimental change in responsibilities, a negative change in the terms and conditions of employment, or some such actual and unfavorable change in job status. *Birone v. Indian River Sch.*, 1998 US App. LEXIS 7603. Of course, the Petitioner had a change of terms of her employment opportunities that was based on a discriminatory practice. She was forced to work on weekends and late hours, even though she had vested years in a position working during the day Monday through Fridays and replaced by a male with less criteria.

If the lower courts' opinions are affirmed then there is no accountability imposed upon a government agency to enforce its own policies and federal regulations regarding discrimination and proper investigation. The Respondent intentionally delayed any action in order to prejudice the Petitioner in filing a complaint with the EEO.

B. The doctrine of equitable tolling revives the Petitioner's claim since the Respondent must be held liable for its failure to comply with internal regulations to investigate a discrimination allegation and purposely caused the Petitioner to file a complaint with the EEO late.

Since the Petitioner was complying with the internal grievance policies, she failed to file a complaint with the EEO within the forty-five day period. Thereby, the EEO and lower courts dismissed her complaint as untimely as failing to properly exhausted her administrative remedies before filing an action in District Court.

Nonetheless, the Petitioner established that the doctrine of equitable tolling or waiver should apply based upon the Respondent's confusing and contradictory policies and procedures for handling discrimination complaints. Because she followed those procedures in an effort to resolve the matter through her chain of command, the forty-five (45) day period established for filing the complaint with the EEO should have been tolled. A contrary result would be inequitable.

Generally, an aggrieved federal employee is required to initiate contact with the EEOC within 45 days of the effective personnel action. 29 C.F.R. § 1614.105(a)(1). However, compliance with this time period is not absolute. The 45-day time period is not a jurisdictional prerequisite to filing an action in federal district court. *Boddy vs. Dean*, 821 F.2d 346, 350 (6th Cir. 1987), citing, *Zipes vs. Trans World Airlines, Inc.*,

455 U.S. 385, 393, 71 L.Ed 2d 234, 102 S.Ct. 1127 (1982).

Indeed, even the applicable regulations allow the reviewing agency to extend the deadline for various reasons, including situations where despite due diligence, the complaining party was prevented by circumstances beyond his or her control from contacting the counselor within the time limits or for other reasons considered sufficient by the agency. 29 C.F.R. § 1614.105(a)(2). Thus, the 45 day filing requirement is subject to the principles of equitable tolling. *Benford vs. Frank*, 943 F.2d 609 (6th Cir. 1991).

In construing the circumstances where equitable tolling should be applied, courts have consistently recognized that the purpose of the EEOC administrative process is to encourage reconciliation and arbitration of employee grievances prior to litigation. Therefore, the time limits for filing an administrative claim should not be applied "inflexibly and mechanically." *Morgan vs. Washington Mgf. Co.*, 660 F.2d 710, 711 (6th Cir. 1981). This Court, in *Morgan*, concluded that "in the absence of prejudice to the defendant or a showing of bad faith or lack of diligence by a claimant, equitable consideration should toll the [180] day period for filing a complaint..." *Id.* at 711; *Cantrell vs. Knoxville Comm. Devel. Corp.*, 60 F.3d 1177, 1179 (6th Cir. 1995).

Other courts have held that equitable tolling is appropriate where "a claimant has been lulled into inaction by her employer, state or federal agencies or the courts." *EEOC vs. Dillard Dept. Stores, Inc.*, 768 F.Supp. 1247, 1252 (W.D. Tenn. 1991); *Martinez vs. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984). In other cases,

courts have held that a plaintiff must show that she was actively pursuing her legal rights and that she was actively misled by the agency into allowing the administrative deadline to pass in order to invoke the doctrine of equitable tolling. *Higgins vs. Runyon*, 921 F. Supp 465, 468 (E.D. Mich. 1996). The lower courts took an impermissible approach to the doctrine of equitable tolling and in fact undermined its purpose.

In the present case, the Petitioner did not contact the EEOC counselor within 45 days of the effective date of her change in job assignment. However, the Petitioner should be entitled to preserve her claims based upon the doctrine of equitable tolling and waiver. The Petitioner alleges that she actively and diligently pursued a resolution to her complaint by following established and prevailing policies concerning complaints of discrimination in the workplace. The Petitioner was lulled into inaction, based upon both the Respondent's policies and procedures, as well as the delaying and improper response of its managers.

As a manager, the Petitioner received annual training courses on proper procedures for handling issues and complaints of employment discrimination. Publication 552, issued by the Respondent, mandated how the Manager, Postmaster and Supervisor were to respond to complaints of sexual harassment. Publication 552, page 9, stated as follows:

Role and Responsibility of the Manager, Postmaster, and Supervisor:

> It is your role to listen, inquire, and try to resolve a sexual harassment

> complaint. If you do not have the authority to conduct an inquiry, you must take it to a manger, postmaster, or supervisor who does.

In addition, the manual required the Manager receiving the complaint to take every incident seriously and to follow up and inform employees of their rights and remedies. The Publication then imposes initial requirements upon the manager receiving the complaint. The manual states:

> This [initial] inquiry imposes upon managers, postmasters, and supervisors the obligation to react promptly to complaints alleging sexual harassment and compels them to deal with the problem. In short, it avoids both wholesale dismissal of such compliant and referral of the issue to a EEO counselor. While the latter is appropriate when the employee wishes to bring a complaint, it is not appropriate only to refer the employee to an EEO counselor instead of dealing with the employee's problem.

Although Publication 552 refers to complaints of sexual harassment, the same procedures apply to other workplace complaints. In addition, the Petitioner believed that the EEO counselor did not the have the authority to rescind the Respondent's illegal job actions. The Sixth Circuit deviated from its previous holdings. The Sixth Circuit holds that affirmative representations by the employer that misled a Title VII of the Civil Rights Act of 1964, 42 UCSC Section 2000e

et. seq., complainant into missing a filing deadline are sufficient to toll the applicable Title VII period. The Sixth Circuit has allowed equitable tolling in situations where the claimant has been induced or tricked by her adversary's misconduct into allowing the filing deadline to pass. *See Leake v. Univ. of Cincinnati*, 605 F.2d 255, 259 (6th Cir. 1979). Contrary to the lower courts' opinions, the Respondent's adverse misconduct of failing to investigate and comply with internal policies caused the forty-five day period to lapse. Thus, the deadline must be equitably tolled in order to reach an equitable result.

Based upon the Petitioner's training regarding policies and procedures, coupled with the written policies found in Publication 552, the Petitioner appealed for a resolution through her chain of command, rather than immediately file with the EEOC. Even after she complained of being treated disparately, the Respondent failed to promptly launch an investigation into the circumstances surrounding the Petitioner's complaint, as mandated by its own policy. The Petitioner detrimentally relied on the Respondent's management to adhere to policies and to address her complaint. They responded after the 45-day time period had elapsed. The Petitioner did however, contact EEOC within 45 days of her last communication her supervisor. Thus, the Respondent violated its written policies and coupled with the managers' circuitous actions had effectively lulled the Petitioner into inaction while she waited for a remedy that never came. The Petitioner was diligent in pursuing her rights under the policies she felt were applicable to her situation, based upon the Respondent's training and written procedures.

Given these facts and circumstances, as well as the articulated goals of resolving disputes prior to the filing of litigation, the Petitioner met the standard for equitable tolling and waiver. The Respondent must be estopped from denying liability.

The Petitioner had never been given the opportunity to pled her theory of liability or to argue the facts alleged in her complaint. When a claimant alleges disparate treatment, "liability depends on whether the protected trait actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701 (1993). The Petitioner had sufficient evidence, especially given the "male" supervisors' acts, that an adverse decision was made based upon a discriminatory decision.

"When there is direct evidence that discrimination was a motivating factor in the challenged employment decision, the appropriate analysis is different from that employed in a case where only circumstantial evidence is available.". *Trotter v. Board of Trustees of University of Alabama*, 91 F.3d 1449, 1453 (11th Cir. 1996); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 961 (11th Cir. 1997); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir.), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984); *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990); by presenting circumstantial evidence which complies with the test set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); or by presenting a statistical pattern of discrimination. *Earley* at 1081. Discrimination can be proved with direct or indirect

evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994).

The Petitioner submitted sufficient circumstantial evidence to meet her burden of proof; however, her right was wrongfully taken away. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established the standard necessary for the Petitioner to meet her burden of proof with respect to his discrimination allegations. The Court stated that in order to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 19642 cases, the plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, then the court must enter judgment for the plaintiff. *Id.* The

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2 Congress extended the protections of Title VII of the Civil Rights Act of 1964, as amended, to federal employees in Section 11 of the Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 103. As amended, Section 717(a) of Title VII prohibits federal agencies from discriminating against employees on the basis of race, color, religion, sex, or national origin.

circumstantial evidence as stated above was overwhelming.

In light of the recent case law stated in *Reeves v. Sanderson Plumbing Products*, the Petitioner met her burden of proof. The *Reeves* case has clarified a controversy which existed in the federal circuits regarding a claimant's burden of proof in a discrimination action.3 Under *Reeves*, once the *McDonnell* criteria for establishing a prima facie case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

Under the *Reeves* standard, once the Petitioner met the four *McDonnell* criteria, then if the Court finds that the Respondent's explanation of its actions not to be credible, there must be a finding of discrimination. There is no more shifting of burdens of proof and persuasion back to the Petitioner.

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3 The debate among federal courts is whether, if the jury discounts the employer's explanation, the plaintiff must still produce evidence, other than the four factors set forth above, that the employer intentionally discriminated against the employee.

The Respondent had no response for the discrimination allegations. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination even though it is persuasive. *St. Mary*, at 517. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1995). The employer's explanation of its legitimate reasons must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). Of course, in our facts, the Respondent intentionally avoided to address the Petitioner's complaint.

The Supreme Court has recognized that a public employee who alleges that she was not promoted or hired because of race states a viable claim under 42 U.S.C. Section 1983 and that her First Amendment rights have been violated. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.ed.2d 52 (1990); *McClintock v. Eichelberger*, 169 F.3d 812 (1999), cert. denied, __ S.Ct. ___, 68 USLW 3106 (1999). The Petitioner was not hired to fulfill a position that she once held based upon her gender.

If given the opportunity, the Petitioner would submit substantial evidence to discredit any proffered reason that discrimination was more likely than not a motivating or substantial cause of the adverse action. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3rd Cir. 1994).

Discrimination exists "in forms as myriad as the creative perverseness of human beings can provide. *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir. 1980). The Petitioner was discriminated against due to her gender. Therefore, the doctrine of equitable tolling applied to the facts. The Petitioner must be given the opportunity to enforce her constitutional rights and be treated equally under the laws.

CONCLUSION

The District of the Northern District of Ohio and the Sixth Circuit Court of Appeals erred in dismissing the Petitioner's claim as untimely. The Petitioner was forced to comply with the Respondent's internal policy and procedure. The Respondent's intentional delay of investigating the claims caused an alleged late filing of the Petitioner's complaint with EEO. However, under the doctrine of equitable tolling, the Petitioner's complaint should have been submitted to a trier of fact. The Respondent, a government agency, should be held at a higher standard to comply with discrimination claims.

The Court should grant *certiorari* to review this important matter and order that the Petitioner has a constitutional right to pursue her discrimination allegations before a trier of fact.

Respectfully submitted,

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pro se
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(Any footnotes trail the end of each document)

No. 02-3395

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

VICKI STEINER,
Plaintiff-Appellant,

v.

WILLIAM J. HENDERSON, Postmaster General,
United States Postal Service,
Defendant-Appellee.

September 16, 2003, Argued
December 8, 2003, Decided
December 8, 2003, Filed

COUNSEL: ARGUED: Elizabeth A. Raies, TZANGAS, PLAKAS, MANNOS & RECUPERO, Canton, Ohio, for Appellant.

William J. Kopp, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

ON BRIEF: Elizabeth A. Raies, TZANGAS, PLAKAS, MANNOS & RECUPERO, Canton, Ohio, for Appellant.

William J. Kopp, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

JUDGES: Before: SUHRHEINRICH, COLE, and ROGERS, Circuit Judges.

OPINIONBY: SUHRHEINRICH

OPINION:

SUHRHEINRICH, Circuit Judge. Plaintiff-Appellant Vicki Steiner appeals from the district court's dismissal of her Title VII claim for failure to exhaust her administrative remedies. The district court dismissed Steiner's claim under Fed. R. Civ. P. 12(b)(6) because Steiner had failed to file her gender discrimination claim with an Equal Employment Opportunity Commission ("EEOC") officer within forty-five days of the alleged discriminatory occurrence, as required by 29 C.F.R. § 1614.105(a)(1). Steiner contends that principles of equitable tolling apply, despite her failure to timely contact an EEO counselor, because she actively and diligently pursued a resolution to her complaint by following an established employer policy concerning discrimination complaints in the workplace. We affirm the decision of the district court.

I.

Steiner is an employee of the United States Postal Service ("USPS"). For the past twenty-four years, she has worked at the USPS mail processing plant in Canton, Ohio. In 1997, she received a promotion to the position of Manager of Distribution Operations ("MDO") for the weekday day shift. As a MDO, Steiner's new responsibilities included managing employees who process mail in the plant.

In April 1998, Judson Zernechel arrived at the Canton plant as the new plant manager, and Steiner's supervisor. On October 4, 2000, Zernechel distributed a letter informing Steiner that she was to be reassigned, effective October 7, to the position of MDO "in training," and that she would no longer be working the day shift Monday through Friday, but the midnight shift Thursday through Monday.

Steiner was displeased with her reassignment and apparently perceived the reassignment as discrimination based on her gender. Accordingly, she sought redress. On October 18, she sent a letter to Frank Neri, the Senior Plant Manager and Zernechel's direct superior, requesting a meeting to discuss her reassignment. The letter stated that Steiner felt she was "being treated disparately."

Neri responded on October 20, and informed Steiner that she should contact Zernechel directly to discuss her concerns. Steiner did not contact Zernechel as Neri had instructed, but instead contacted Jordan Small, the District Manager and Neri's direct superior, by letter on November 8, and requested a meeting to discuss the situation. Small responded in writing on November 15 and informed Steiner that he had no jurisdiction to handle her complaint and stated that he was referring her letter back to Neri, the Senior Plant Manager.

Neri responded to the forwarded letter on December 4, and again informed Steiner that she should attempt to meet with Zernechel, her direct supervisor, to discuss the matter. Specifically, Neri stated that he wished to "encourage [Steiner] again to meet with Judson Zernechel so decisions can be made that best suit

[Steiner] and [her] future success with the [USPS]." Moreover, in this December 4 letter, Neri stated that he was willing to be present at any meeting between Zernechel and Steiner.

Steiner again failed to attempt to meet with Zernechel, and contacted the EEOC for pre-complaint counseling on January 9, 2001. She subsequently filed a Title VII complaint with the USPS EEOC on February 7, 2001. The USPS EEOC dismissed her complaint as untimely on March 15, 2001. She filed suit in the district court on May 3, 2001. The USPS filed a motion to dismiss Steiner's complaint as untimely, and the district court granted that motion on March 28, 2002, because Steiner had not filed her complaint with the EEOC within the forty-five day deadline provided by 29 C.F.R. § 1614.105(a)(1). Moreover, the district court found that there was no reason to equitably toll the filing deadline under the circumstances. Steiner filed a notice of appeal to this Court on April 10, 2002, and her appeal of the district court's dismissal is timely before us.

II.

We review de novo a district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6). Amini v. Oberlin Coll., 259 F.3d 493, 497 (6th Cir. 2001). We will dismiss the plaintiff's claims only if it is clear that the plaintiff "can prove no set of facts in support of the claims that would entitle him to relief." Id. (citation omitted).

"We review a district court's decision to grant or deny equitable tolling de novo when the facts are undisputed or the district court rules, as a matter of law, that

equitable tolling is not available; in all other circumstances we review for an abuse of discretion." Seay v. Tenn. Valley Auth., 339 F.3d 454, 469 (6th Cir. 2003).

III.

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e, et seq., provides the exclusive judicial remedy for claims of discrimination in federal employment. See Brown v. General Servs. Admin., 425 U.S. 820, 835, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976). "In permitting federal employees to sue under Title VII, Congress conditioned the government's waiver of sovereign immunity upon a plaintiff's satisfaction of 'rigorous administrative exhaustion requirements and time limitations.'" McFarland v. Henderson, 307 F.3d 402, 406 (6th Cir. 2002) (quoting Brown, 425 U.S. at 833). At issue here is the requirement that a federal employee claiming discrimination must contact an Equal Employment Opportunity ("EEO") counselor within forty-five days of an alleged discriminatory occurrence. 29 C.F.R. § 1614.105(a)(1) (2003). Failure to do so is cause for dismissal of the complaint by the agency, see 29 C.F.R. § 1614.107(a)(2) (2003), as well as by the district court. See Brown, 425 U.S. at 832 (noting that § 717(c) allows an aggrieved employee to file a civil action in federal district court, but that the complainant must first seek relief in the agency that had discriminated against him).

Steiner does not dispute that she failed to contact an EEO counselor within forty-five days of the October 7, 2000, reassignment. However, Steiner argues that the

forty-five day period is subject to principles of equitable tolling. Indeed, the forty-five day filing period is not a jurisdictional prerequisite, and can be tolled where principles of equity demand it. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982); see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95, 112 L. Ed. 2d 435, 111 S. Ct. 453 (1990) (extending Zipes to administrative requirements for federal employees); Mitchell v. Chapman, 343 F.3d 811, 819-20 (6th Cir. 2003); Seay, 339 F.3d at 469. This Court has held that a federal employee's obligation to consult with an EEO counselor within a set time period as a precondition to suit is subject to equitable tolling, waiver, and estoppel. Mitchell, 343 F.3d at 819-20.

At the same time, the Supreme Court has made clear that tolling in a Title VII context should be allowed "only sparingly." Irwin, 498 U.S. at 96. This Court has similarly noted that equitable tolling is "available only in compelling cases which justify a departure from established procedures." Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1488 (6th Cir. 1989).

In considering whether equitable tolling should apply, we generally look at five factors: (1) whether the plaintiff had actual notice of the time restraint; (2) whether she had constructive notice of the time restraint; (3) the degree of diligence exerted in pursuing her rights; (4) the degree of prejudice to the defendant; and (5) the reasonableness of plaintiff's ignorance of the time constraint. EEOC v. Ky. State Police Dep't, 80 F.3d 1086, 1094 (6th Cir. 1996); Andrews v. Orr, 851 F.2d 146, 151 (6th Cir. 1988). These factors are not exclusive bases for equitable tolling,

however, and the decision to allow equitable tolling is made on a case-by-case basis. Seay, 339 F.3d at 469 (citations omitted).

Steiner attached a copy of the USPS's "Publication 552," entitled "Manager's Guide to Understanding Sexual Harassment," to her memorandum in opposition to the USPS's motion to dismiss below. n1 On page ten of that publication, the forty-five day filing requirement is clearly delineated. Steiner has admitted that, as a manager herself, she was intimately familiar with these guidelines, and further states that she relied on this publication to determine how to proceed with her complaint. By her own admission, Steiner had actual knowledge of the time limits. Cf. Amini, 259 F.3d at 501 (noting that the plaintiff, a lawyer, admitted in his brief that he was aware of both the EEOC filing requirements and the applicable limitations period; agreeing with the district court that equitable tolling was not warranted). Moreover, Steiner's correspondence with her superiors indicates that Steiner had hired an attorney as early as October 18, 2000. "Constructive knowledge of a time limit will usually be imputed when the plaintiff retains an attorney within the limitations period." Weigel v. Baptist Hosp., 302 F.3d 367, 376 (6th Cir. 2002); Jackson v. Richards Med. Co., 961 F.2d 575, 579 (6th Cir. 1992). Accordingly, we find little doubt that Steiner had actual, let alone constructive, notice of the forty-five day filing deadline. She was aware of the filing deadline and failed to follow the Senior Plant Manager's instructions on how to pursue her claim internally. Therefore, the first, second, and fifth factors cut against Steiner's argument for equitable tolling.

Nevertheless, Steiner claims that the forty-five day filing period should be tolled because she diligently pursued her claim during that time period. Steiner presents her correspondence with both Neri and Small to illustrate that she was in pursuit of her claim at all times. However, although Steiner claims the pursuit of her claim was diligent, she has admitted that at no time did she follow Neri's instructions as to how to proceed with her claim. Neri twice instructed Steiner to contact Zernechel for another meeting, and even offered to appear at such a meeting. Steiner never contacted Zernechel. Thus, the third factor also cuts against Steiner.

Steiner further claims that Neri's and Small's refusal to agree to meet with her or to personally address her claim contributed to her missing the deadline, and constituted misleading tactics that should likewise toll the deadline period. This Court has held that affirmative representations by the employer that misled a Title VII complainant into missing a filing deadline are sufficient to toll the applicable Title VII period. See, e.g., Leake v. Univ. of Cincinnati, 605 F.2d 255, 259 (6th Cir. 1979); see also Irwin, 111 S. Ct. at 458 (noting that the Court has allowed equitable tolling in situations where the claimant "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). In Leake, we found it necessary to equitably toll the filing deadline because the defendant employer had specifically requested that the plaintiff not seek EEOC counseling until it had time to investigate the plaintiff's allegations. There we found:

It was during the period of voluntary negotiations that plaintiff and the University agreed that she would give the University sufficient time to investigate her complaints, and the University agreed that it would not use the time it spent in its investigation to prejudice plaintiff with respect to any statute of limitations. It appears to us that the University's express statements, and plaintiff's reliance thereon, could reasonably have led plaintiff to delay in the filing of her charges with the EEOC.

605 F.2d at 259. Here, Neri, through his letters, merely encouraged Steiner to first seek redress from Zernechel. Nowhere in either of Neri's letters to Steiner did Neri mention the filing deadline. Nor did Neri ever discourage Steiner from immediately filing her claim with the EEOC. Therefore, we cannot find that Neri, or any other USPS supervisor, tricked Steiner or did anything untoward in order to prevent her from seeking EEOC counseling. Steiner was free to seek EEOC counseling at any time. Cf. Seay, 338 F.3d at 468-70 (holding that equitable tolling was warranted where the employer informed the plaintiff that no one had received the job, but omitted additional information that another employee had been "rotated" into the position for "developmental purposes"; stating that "this was the critical information Plaintiff needed to raise his suspicions about the employer's possible racially discriminatory motive in rejecting him").

Furthermore, Steiner has not presented any evidence that either Neri or Small blatantly disregarded USPS policy in an effort to improperly delay satisfaction of Steiner's claim. Steiner impliedly argues that either Neri, Small, or both, were required to address her

claim. In her affidavit, Steiner relies on the aforementioned Publication 552 as the basis for this assertion. However, Publication 552 does not make any specific individual responsible for such discrimination complaints, but matter of factly states that each manager, postmaster, and supervisor has the "role [and responsibility] to listen, inquire, and try to resolve a sexual harassment complaint," and that if the supervisor does not "have the authority to conduct an inquiry, [he] must take it to a manager, postmaster, or supervisor who does." First, this is exactly what Small and Neri did in referring her to Zernechel. This vague language does not necessarily render every USPS manager or supervisor responsible for addressing any employee's claim. Second, even if Publication 552 does make every supervisor responsible, it applies only to harassment claims, not discrimination claims. The fact that both harassment and discrimination claims potentially fall under Title VII and are both subject to the forty-five day filing deadline does not necessarily mean that each claim is likewise governed by the same internal grievance procedures. In any event, we find no evidence that either Neri or Small did anything at all to mislead Steiner or to prevent her from timely filing her claim with the EEOC.

Finally, assuming lack of prejudice to the defendant employer had been shown, Steiner would still not be entitled to equitable relief. The Supreme Court has held that the absence of prejudice to the defendant employer "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152, 80 L. Ed. 2d 196, 104 S. Ct. 1723 (1984) (per curiam); Amini, 259 F.3d at 501.

In essence, Steiner seeks equitable tolling because she was proactive in seeking conciliation, and did not passively let the time slip away. Her efforts are at odds with the will of Congress, however. "In Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in the workplace and to work towards the resolution of these claims through conciliation rather than litigation." Patterson v. McLean Credit Union, 491 U.S. 164, 180-81, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989) (citing 42 U.S.C. § 2000e-5(b)); see also Morgan v. Washington Mfg. Co., 660 F.2d 710, 711 (6th Cir. 1981) (stating that the purpose of Title VII's administrative scheme is "to encourage reconciliation and arbitration of employee grievances prior to litigation"). It is only after these procedures have been exhausted and the plaintiff has received a "right-to-sue" letter, that she may pursue a claim in federal court. Patterson, 491 U.S. at 181.

"Voluntary compliance is Title VII's preferred method for promoting the goal of nondiscrimination; it also is the reason for the EEOC's existence." St. John v. Employment Dev. Dep't., 642 F.2d 273, 275 (9th Cir. 1981). See generally Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974) (stating that "cooperation and voluntary compliance were selected" by Congress as the preferred means of assuring equality of employment opportunities by eliminating discrimination, and "to this end, Congress created the [EEOC]" and established a procedure by which the EEOC and cooperating local agencies would have an opportunity to settle disputes through conference and conciliation before the aggrieved party

was allowed to file a lawsuit). Steiner's efforts contravene the congressional decision that the role of conciliator belongs to a third party with expertise, the EEOC. As such, her efforts do not provide a suitable basis upon which to grant equitable relief. Cf. Puckett, 889 F.2d at 1488 (holding that equitable tolling was not warranted where the plaintiff merely requested withdrawal of her EEOC charges but did not request a right-to-sue letter; stating that "such a decision flouts the statutory requirement of a receipt of a right-to-sue letter, and amounts to a position of arrogance regarding the statutory requirement as mere surplusage").

As we remarked in Graham-Humphreys v. Memphis Brooks Museum of Art, 209 F.3d 552 (6th Cir. 2000), "typically, equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." Id. at 560-61 (and cases therein); see also Brown v. Crowe, 963 F.2d 895, 899-900 (6th Cir. 1992) (holding that equitable tolling applied where the legal mistake which caused the plaintiff not to meet the statutory time requirements was made by a state agency and through no fault of plaintiff). The circumstances of this case certainly do not fit within that model. As the Supreme Court observed in Baldwin,

> procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. As we stated in Mohasco Corp. v. Silver, 447 U.S. 807, 826, 65 L. Ed. 2d 532, 100 S. Ct. 2486 . . . (1980), "in the long run, experience teaches that strict adherence to the procedural requirements

specified by the legislature is the best guarantee of evenhanded administration of the law." Brown, 466 U.S. at 152. Accordingly, we hold that the district court did not err in dismissing this action for failure to meet the forty-five day filing period. In other words, the district court did not err in holding as a matter of law that equitable tolling was not warranted on the facts of this case.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

FOOTNOTES

n1 This publication deals only with sexual harassment claims, and not discrimination claims. Steiner, however, uses this publication to demonstrate that she was aware of the internal operating procedures of the USPS.

CASE NO. 5:01CV1064

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

VICKI STEINER,
Plaintiff,

vs.

WILLIAM J. HENDERSON, POSTMASTER GENERAL, U.S.P.S.,
Defendant.

March 28, 2002, Decided

COUNSEL: For Vicki Steiner, Plaintiff: David L. Dingwell, Elizabeth A. Raies, Gary A. Corroto, Tzangas, Plakas, Mannos & Recupero, Canton, OH.

For William J. Henderson, Defendant: William J. Kopp, Office of the United States Attorney, Northern District of Ohio, Cleveland, OH.

JUDGES: Dan Aaron Polster, United States District Judge.

OPINIONBY: Dan Aaron Polster

OPINION:

MEMORANDUM OF OPINION AND ORDER

Before the Court are Defendant's Motion to Dismiss (ECF No. 12) and Plaintiff's Motion to Amend Complaint (ECF No. 17). For the reasons stated below, Defendant's Motion to Dismiss (ECF No. 12) is GRANTED and Plaintiff's Motion to Amend (ECF No. 17) is DENIED.

I. FACTS

Plaintiff Vicki Steiner filed a Complaint (ECF No. 1) in this Court on May 3, 2001, alleging that her employer, the United States Postal Service, violated Title VII and Ohio's anti-discrimination statute by assigning her a lesser job classification and less desirable days off on the basis of her gender. Plaintiff's Complaint also included a claim for intentional infliction of emotional distress.

On October 11, 2001, Defendant filed a Motion to Dismiss (ECF No. 12) in which it argues that Plaintiff's claims should be dismissed because she failed to timely exhaust her administrative remedies and because Title VII is the exclusive remedy for her discrimination complaint. Defendant argues that under federal regulations, Plaintiff was required to contact an Equal Employment Opportunity (EEO) counselor within 45 days of the alleged discrimination. Although the alleged discriminatory action occurred on October 7, 2000, Plaintiff did not meet with an EEO counselor until January 9, 2001.

On October 24, 2001, Plaintiff dismissed both of her state law claims. (ECF No. 15). On the same day,

Plaintiff filed a Memorandum in Opposition (ECF No. 13) in which she admits that her EEO complaint was not timely, but argues that her claim should be permitted to go forward pursuant to the doctrine of equitable tolling. Plaintiff claims that equitable tolling is appropriate because while the 45-day period ran, she was attempting to resolve her claims of discrimination by seeking the assistance of Postal Service supervisors. Plaintiff contends that her training as a supervisor led her to believe that she should work with her own supervisors to resolve any grievances and maintains that she did not think that it was necessary to contact the EEO until she received a letter from a supervisor on December 4, 2000, which led her to believe that no action would be taken with regard to her grievances. (ECF No. 13, Ex. 9). Plaintiff did not meet with an EEO counselor until over a month after she received the December 4, 2000 letter.

On October 30, 2001, Defendant filed a reply brief (ECF No. 15) arguing against the application of the equitable tolling doctrine. In the reply brief, Defendant points out that the December 4, 2000 letter does not state that management was unwilling to resolve Plaintiff's grievances. Rather, the letter stated that Plaintiff needed to meet with her supervisor and that Senior Plant Manager Neri would attend the meeting if Plaintiff wished him to do so. Defendant further notes that the "Manager's Guide to Understanding Sexual Harassment" which Plaintiff attaches to her brief as evidence of a Postal Service policy encouraging the resolution of grievances by supervisors specifically references the 45-day requirement for filing EEO complaints.

On February 12, 2002, Plaintiff filed a Motion to Amend Complaint (ECF No. 17) in which she seeks to add a retaliation claim to her Complaint. In the proposed amended complaint, Plaintiff contends that Defendant retaliated against her in June 2001 by denying her requested sick leave and by issuing a letter incorrectly stating that Plaintiff's position was vacant.

II. LEGAL ANALYSIS

A. Defendant's Motion to Dismiss

Before a federal employee may file a lawsuit under Title VII, she must first exhaust her administrative remedies. Brown v. General Serv. Admin., 425 U.S. 820, 832, 48 L. Ed. 2d 402, 96 S. Ct. 1961 (1976). Under 29 C.F.R. § 1614.105(a)(1), an aggrieved employee must contact an Equal Employment Opportunity ("EEO") counselor within 45 days of the alleged discriminatory act. This 45-day time is not jurisdictional, and therefore may be subject to the doctrines of equitable tolling, waiver, or estoppel.

While courts have recognized the possibility of equitable tolling in Title VII cases, such tolling is "available only in compelling cases which justify a departure from established procedures." Puckett v. Tennessee Eastman Co., 889 F.2d 1481, 1488 (6th Cir. 1989). Indeed, the Sixth Circuit has repeatedly indicated that the factual circumstances of a case are seldom compelling enough to warrant equitable tolling. See, e.g., Dunlap v. United States, 250 F.3d 1001, 1008 (6th Cir. 2001), cert. denied, 151 L. Ed. 2d 566, 122 S. Ct. 649 (2001); Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552, 560 (6th Cir. 2000).

In determining whether equitable tolling should apply, courts typically consider the following factors: (1) lack of actual notice of the filing requirement; (2) lack of constructive notice of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirements. Andrews v. Orr, 851 F.2d 146, 151 (6th Cir. 1988). The Sixth Circuit has stated that while this list of factors is instructive, it is neither comprehensive nor relevant in all cases. Amini, 259 F.3d at 500. In the end, the determination of whether to toll a limitations period must be made on a case-by-case basis. Id. When equitable tolling has been permitted, it is usually because the defendant "engaged in misrepresentations or other wrongdoing" that caused the plaintiff to miss his filing deadline or somehow attempted to thwart the plaintiff's discovery of relevant evidence. Id. at 501.

In this case, Plaintiff does not claim that she was unaware of the 45-day requirement or that Defendant somehow deliberately caused her to miss the deadline. Rather, Plaintiff argues that equitable tolling should apply to her case because the 45-day period ran while she was diligently pursuing her grievances through supervisory channels. Plaintiff's purported diligence in attempting to resolve her grievances by working through supervisory channels does not excuse her from filing a timely claim with the EEO. As a supervisor who, according to her own correspondence, had retained an attorney by October 18, 2000, Plaintiff knew or should have known that she was still required to contact the EEO within the 45-day time period. Indeed, the "Manager's Guide to Understanding Sexual Harassment" attached to Plaintiff's Memorandum in

Opposition makes it quite clear that an aggrieved employee must comply with the 45-day requirement regardless of any efforts to resolve grievances by working through supervisory channels.

Furthermore, the evidence reveals that Plaintiff's purported diligence in pursuing her grievances is somewhat disingenuous. Plaintiff claims that she did not feel the need to contact the EEO until it became apparent from her last communication with Mr. Neri (the December 4, 2000 letter) that her supervisors were not going to follow the Postal Service policy of promptly addressing employee discrimination complaints. An examination of the December 4, 2000 letter reveals, however, that Mr. Neri did not indicate an unwillingness to address Plaintiff's grievances. Rather, Mr. Neri encouraged her to meet with another supervisor and expressed his willingness to be present for the meeting. Even if the December 4, 2000 letter had communicated an unwillingness to address Plaintiff's grievances, it does not explain Plaintiff's decision to wait a full month after receiving the letter before contacting the EEO. Given these facts, the Court finds no basis for applying the doctrine of equitable tolling to Plaintiff's claim. For this reason, Defendant's Motion to Dismiss (ECF NO. 12) is GRANTED.

B. Plaintiff's Motion to Amend

Plaintiff seeks to amend her complaint by adding claims of retaliatory behavior that allegedly occurred one month after she filed her initial complaint in this Court. Although a plaintiff may tie a retaliation claim to a previously filed discrimination claim, the previously

filed claim must be properly before the Court in order for the claim to relate back to the initial complaint. See, e.g., Ang v. Proctor & Gamble Co., 932 F.2d 540, 546 (6th Cir. 1991) (finding that district court has ancillary jurisdiction over retaliation claims growing out of an administrative charge properly before the court). As discussed above, Plaintiff's initial Complaint was not properly before the Court because she failed to comply with the 45-day requirement for contacting the EEO and presented no sufficient basis for tolling the 45-day period. Because there is no valid complaint to amend, Plaintiff's Motion to Amend Complaint (ECF No. 17) must be DENIED.

III. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss (ECF No. 12) is GRANTED and Plaintiff's Motion to Amend (ECF No. 17) is DENIED.

IT IS SO ORDERED.

S/Dan Aaron Polster 3/28/02
United States District Judge

JUDGMENT ENTRY

For the reasons stated in the Order filed contemporaneously with this Judgment Entry, and pursuant to Federal Rule of Civil Procedure 58, it is hereby ORDERED, ADJUDGED AND DECREED that the above-captioned case is hereby terminated and dismissed as final.

IT IS SO ORDERED.

S/Dan Aaron Polster 3/28/02
United States District Judge